FILED
SID J. WHITE
OCT 17 1994
CLERK, SUPREME COURT
By
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

GUY GAMBLE,

Appellant/Cross-Appellee,

vs.

STATE OF FLORIDA,

Appellee/Cross-Appellant.

CASE NO. 82,334

APPEAL FROM THE CIRCUIT COURT
IN AND FOR LAKE COUNTY
FLORIDA

REPLY BRIEF OF APPELLANT/ANSWER BRIEF OF CROSS-APPELLEE

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
(904) 252-3367

ATTORNEY FOR APPELLANT

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REPLY BRIEF OF APPELLANT

POINT I

IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT IMPOSED THE DEATH PENALTY UPON AN ERRONEOUS FINDING THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER.

Appellee's argument in response to this issue contains several legal and factual misinterpretations. Appellee first states that procuring a weapon before a murder supports the heightened premeditation required for cold, calculated and premeditated. What this argument fails to recognize is that Appellant was also charged with and convicted of robbery with a deadly weapon. Thus, the procurement of the weapon was an essential element of the crime of robbery. To accept Appellee's contention that the procurement of the weapon beforehand supports

this aggravating circumstance would turn every armed robbery of a convenience store into an automatic cold, calculated and premeditated offense. Certainly this is not true.

Next, Appellee states, "There is no evidence to reasonably suggest Gamble had any motive other than to kill the victim." (Brief of Appellee, p. 6) This statement defies all logic. The state's theory at trial and certainly the evidence supports the finding that Appellant's primary motive was to rob the victim. If, as Appellee states, there was no other motive than to kill the victim then the aggravating circumstance of pecuniary gain cannot be found since, according to Appellee, this must of just been an incidental afterthought on the part of Appellant.

Next, Appellee makes much of the fact of what he perceives to be a prior threat to the victim made to Appellant's girlfriend a week before the murder. (Brief of Appellee, p. 8) Appellee is referring to the statement made by Appellant that he intended to "take out" the victim. Once again, Appellant must emphasize that the meaning of "take out" is not at all clear. Certainly it is consistent with the evidence below that Appellant intended to disable the victim in order to accomplish the theft of the property. In this regard "take out" could equate to "knock out." Certainly the words "take out" do not only mean murder. Rather, as Appellant testified, he meant to render the victim unconscious to accomplish his intended purpose of taking the victim's property.

Appellee concedes that the instruction given on cold, calculated and premeditated is the exact instruction condemned in Jackson v. State, 19 Fla. L. Weekly S215 (Fla. April 21, 1994). However, Appellee argues that the sufficiency of the jury instruction has not been preserved for appeal. As argued in the Initial Brief, while the objection by trial counsel below could have been more specific, it was sufficient enough to alert the trial court to the problem at issue. In response to Appellant's argument that trial counsel should not be faulted for failing to make a more specific objection in light of the years of this Court finding no error in the instruction, Appellee responds that counsel was expected to object and preserve the record concerning all issues which are cognizable on appeal. (Brief of Appellee, p. 10) However, Appellee then incredibly argues that in any 3.850 proceeding counsel could not be found ineffective for failing to anticipate a change in the law and therefore the failing to object was within the realm of competent legal counsel. Appellee is arguing out of both sides of his mouth. The bottom line is that the instruction given on the record below is clearly deficient. The evidence certainly does not support the giving of this instruction. Even if there is some arguable evidence supporting this, the failure of the trial court to properly instruct the jury must be deemed harmful error given the lack of aggravating circumstances in the instant case.

Finally, Appellant draws this Court's attention to its recent decision in Spencer v. State, 19 Fla. L. Weekly S460 (Fla.

September 22, 1994), wherein this Court struck the finding of cold, calculated and premeditated as it applied to the murder in Spencer. A review of the facts in Spencer is important. In this regard Appellant points to Justice Grimes' concurring and dissenting opinion wherein he states:

> ... On December 10, 1991, Spencer choked his wife and told her that he would kill her if she did not give him some money. The following day he called her from jail and said he would finish what he started when he got out. On January 1, 1992, he told a friend that he would like to take his wife out on a boat and throw her overboard. Two days later he reported that she would not go out in a boat anymore. The following day, he beat his wife with an iron, requiring eleven stitches to her face. Finally, early in the morning of January 18, 1992, he parked his car away from her home and approached the house wearing surgical gloves. He might have remained undetected except that his wife's son was awakened by her screams from being hit in the head with a brick. After chasing the son away, Spencer stabbed his wife to death and fled.

Id. at S463. Despite these facts, the majority of this Court held that the cold, calculated and premeditated aggravator was not applicable. In the instant case the facts are nowhere near as egregious as the facts in Spencer. Simply put, the facts show that this was a robbery that got out of hand. As such, this aggravating factor must be stricken and this Court must remand the case for imposition of a life sentence.

ANSWER BRIEF OF CROSS-APPELLEE

POINT I

THE TRIAL COURT PROPERLY PROHIBITED THE STATE FROM INTRODUCING VICTIM IMPACT EVIDENCE IN THE PENALTY PHASE.

Initially, it must be noted that this issue arose because of a motion filed by the defense to exclude evidence or argument designed to create sympathy for the deceased. (T1479) Defense counsel then argued that the evidence does not tend to prove any of the aggravating circumstances and therefore is irrelevant. The state argued that the legislature adopted Section 921.141(7), Florida Statutes (1992), and therefore such evidence of victim impact is admissible at a penalty phase. The trial court ruled that it simply was not relevant to any issue during the penalty phase. (T1484) Appellant/Cross-Appellee asserts that no error is shown.

A. THE ISSUE IS NOT PRESERVED FOR APPEAL.

Appellant/Cross-Appellee first argues that this issue is not preserved for appellate review. Although the state noted that it wished to call out of state family members to testify as to the fact that the victim was a compassionate man, no real proffer of this testimony was made. Without a proffer appellate review is precluded. Jacobs v. Wainwright, 450 So.2d 200 (Fla. 1984); Nava v. State, 450 So.2d 606 (Fla. 4th DCA 1984). Without this proffer, this Court cannot discern the specifics of what the state was going to present and thus has no way to determine the relevance of such testimony. Therefore, affirmance on this point

is warranted.

B. FLORIDA LAW DOES NOT PERMIT THE STATE TO INTRODUCE EVIDENCE WHICH IS, IN ESSENCE, NONSTATUTORY AGGRAVATION.

Florida has consistently excluded evidence designed to create sympathy for the deceased. Jones v. State, 569 So.2d 1234 (Fla. 1990). See also Lewis v. State, 377 So.2d 640 (Fla. 1979) and Rowe v. State, 120 Fla. 649, 163 So. 22 (1935). This rule of law provides even more protection to a capital defendant at a penalty phase.

> Florida's death penalty statute, Section 921.141, limits the aggravating circumstances on which a sentence of death may be imposed to the circumstances listed in the statute. Section 921.141(5). The impact of the murder on family members and friends is not one of these aggravating circumstances. Thus, victim impact is a nonstatutory aggravating circumstance which would not be an appropriate circumstance on which to base a death sentence. [Citations omitted]

Grossman v. State, 525 So.2d 833, 842 (Fla. 1988).

Contrary to the state's assertion below Payne v. Tennessee, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), does not authorize the introduction of victim impact evidence during the penalty phase of a trial in the state of Florida. Payne holds only that there is no Eighth Amendment bar to victim impact evidence during the penalty phase of a capital trial. Neither Payne, nor any other United States Supreme Court case, deals with the question of whether such evidence is permitted under Florida law.

Since the issuance of the Payne opinion, this Court has

addressed the introduction of victim impact evidence only a few times. In those cases, this Court has rejected an Eighth Amendment challenge, pointing out that Payne receded from Booth v. Maryland, 482 U.S. 496 (1987) and South Carolina v. Gathers, 490 U.S. 805 (1989). See Jones v. State, 612 So.2d 1370 (Fla. 1992); Burns v. State, 609 So.2d 600 (Fla. 1992); and Hodges v. State, 595 So.2d 929 (Fla. 1992). When dealing with the broader contention the victim impact evidence was improperly admitted, this Court focused on the relatively minor effect that the evidence had in each particular case.

Even after Payne, to be admissible, such evidence must be relevant to a material fact in issue. The precluded testimony was not. As noted below, the victim's family did not even live in the state of Florida and thus was not in a position to determine the effect that the victim's death had on the community of Eustis. Indeed, defense counsel argued that the family members were estranged from their father. While the state attorney disputed this, no evidence was presented from which this Court can glean the relevance of any such testimony. Therefore, such evidence was properly precluded.

C. SECTION 921.141(7), FLORIDA STATUTES (1992), IS UNCONSTITUTIONAL ON ITS FACE.

This statute is unconstitutional for a variety of reasons. First, the legislature had no authority to pass this statute as it violates Article V, Section 2(a) of the Florida Constitution which states, in part, "The Supreme Court shall adopt rules for the practice and procedure in all courts." This

Court has consistently held that this provision is exclusive in that any statute which invades this prerogative is invalid. Haven Federal Savings and Loan Association v. Kirian, 579 So.2d 730 (Fla. 1991). Matters at issue in Section 921.141(7) are clearly procedural. Id. The statute at issue is an attempt to regulate practice and procedure. It deals with the method of conducting litigation just as surely as the regulation of voir dire, waiver of jury trial or severance does. Id. at 732. This Court has recognized that rules of evidence may be procedural and thus the sole responsibility of the Florida Supreme Court. In Re Evidence Code, 372 So.2d 1369 (Fla. 1979).

The Florida Constitution also requires that this type of evidence be prohibited, as it provides broader protection than the United States Constitution for a capital defendant. Tillman v. State, 591 So.2d 167 (Fla. 1991). The Tillman court explicitly held that a punishment, in a given case is unconstitutional under the Florida Constitution if it is "unusual" due to the procedures involved. The allowance of victim sympathy evidence violates Article I, Section 17. The existence of this evidence is totally random, depending upon the extent of the deceased's family and friends and their willingness to testify. The strength of this evidence would also depend on the articulateness of the friends and family or other representatives of the community.

The admission of this evidence also violates the due process clause of Article I, Section 9 of the Florida

Constitution. This Court in Tillman, supra, clearly indicates that victim impact evidence violates Article I, Sections 9 and 17 in a capital case even if it is permitted in other cases. Death is a uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny or process than lesser penalties.

The admission of this evidence violates Article I, Sections 9 and 17 in other ways. First, such evidence intrudes into the penalty decision considerations that have no rational bearing on any legitimate aim of capital sentencing. Second, this proof is highly emotional and inflammatory, subverting the reasoned and objective inquiry which the courts have required to guide and regularize the choice between death and lesser punishments. Third, victim impact evidence cannot conceivably be received without opening the door to proof of a similar nature in rebuttal or in mitigation, further upsetting the delicate balance the courts have painstakenly achieved in this area. Fourth, the evidence invites the jury to impose a death sentence on the basis of race, class, and other clearly impermissible grounds. Allowing this type of evidence inevitably makes the entire system freakish and arbitrary and thus unconstitutional.

It must also be noted that Section 921.141(7) is extremely broad and vague. The language concerning the victim's uniqueness as a human being and the resulting loss to the community puts absolutely no limits as to who can testify or what they can testify to. The phrase "loss to the community" contains no definition of community nor does it limit its membership.

This could lead to anyone testifying or even to death sentencing by petition or public opinion poll.

It is clear that a statute, especially a penal statute, must be definite to be valid. Locklin v. Pridgeon, 30 So.2d 102 (Fla. 1947). An attack on a statute's constitutionality must "necessarily succeed" if its language is indefinite. D'Alemberte v. Anderson, 349 So.2d 164 (Fla. 1977). Thus, definiteness is essential to the constitutionality of this statute. The statute at issue here clearly fails under any standard of definiteness under both the United States and the Florida Constitutions.

The term "community" contains a wide variety of meanings. It can be a geographic community or it can mean people with perceived common interests. Even within the concept of a geographic community, it can mean anything from a neighborhood up to the community of nations. The term "community" when applied to a community of interests can mean virtually anything, including common hobbies, jobs, sports teams, political beliefs, religion, race, or ethnicity. The statute's terms are simply too vague and overbroad; capable of a wide variety of clearly impermissible uses.

Additionally, the jury is not give any guidance on how to use this evidence. As noted previously, the evidence does not constitute an aggravating circumstance. Thus, as the trial court recognized below, it could not have any relevance to the issues to be decided by the jury.

The admission of this type of evidence without any guidance is unconstitutional under both the United States and Florida Constitutions. Thus, the trial court correctly refused to allow the state to present such testimony.

POINT II

THE TRIAL COURT CORRECTLY PROHIBITED THE STATE FROM INTRODUCING DONNA YENGER'S TESTIMONY.

At trial the state tried to introduce through the testimony of Donna Yenger, statements made by Mike Love, the codefendant who was not being tried with Appellant. This evidence was hearsay of the rankest kind and therefore was properly precluded by the trial court. Additionally, despite Cross-Appellant's argument to the contrary, there was no showing of any relevance of such a statement to any issue during the penalty phase. The fact of what happened does not have any bearing on either the aggravating circumstance of cold, calculated and premeditated or of pecuniary gain. Inasmuch as the jury recommended death for Mr. Gamble, and the judge imposed death, any error was incredibly harmless. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

POINT III

THE TRIAL COURT CORRECTLY PROHIBITED THE STATE FROM INTRODUCING THE DEFENDANT'S STATEMENT MADE DURING A POLYGRAPH EXAMINATION.

Cross-Appellant argues that the evidence of Appellant's answers during a polygraph examination which was part of a plea negotiation was admissible during the penalty phase. The trial court ruled that it had no relevance and that it had no bearing on either of the aggravating factors argued by the state. Cross-Appellee argues that this was a correct ruling. As Cross-Appellant notes in its brief, Section 921.141, Florida Statutes (1993), states, "In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant." (Brief of Cross-Appellant, p. 26) Obviously, in this case, the trial court did not deem such evidence to be relevant to the nature of the crime or the character of the defendant. Thus, by its very language, the trial court's ruling was correct. Notwithstanding, since these statements were made in a polygraph examination which was part of a plea negotiation, public policy deems that such admissions should not be allowed to be used against the declarant. <u>See</u> Section 90.410, Florida Statutes (1991); Ehrhardt, <u>Florida Evidence</u>, §410.1 (1994) The statements themselves did nothing to prove or even tend to prove either the aggravating circumstances which were argued below. Rather, the state's sole reason for getting these statements in was to attack

the credibility of the defendant. The trial court properly precluded that. Once again, Cross-Appellee wonders how the state was harmed by this in light of the recommendation of the jury and the sentence imposed by the trial court. See State v. DiGuilio, supra.

CONCLUSION

Based on the foregoing reasons and authorities presented in this brief as well as in the Initial Brief, Appellant respectfully requests this Honorable Court to vacate his sentence and remand the case for the imposition of a life sentence. As to the cross appeal points, Appellant/Cross-Appellee urges this Court to affirm the trial court on these matters.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

Michael S. Becker
MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0267082
112 Orange Avenue, Suite A
Daytona Beach, FL 32114
(904) 252-3367

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, Florida 32118 in his basket at the Fifth District Court of Appeal and mailed to Mr. Guy Gamble, #123096 (44-1232-A1), P.O. Box 221, Raiford, FL 32083, this 13th day of October, 1994.

MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER